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U.S. Citizenship and Immigration Services

[redacted]

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FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JUL 28 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center denied the employment-based visa petition. The director's decision to deny the petition was affirmed by the Administrative Appeals Office (AAO) on appeal. The matter is now before the AAO on a motion to reopen and reconsider. The previous decision of the AAO will be affirmed.

The petitioner is a corporation organized in the State of California in June 1987. It imports, exports, and sells golf apparel. It seeks to employ the beneficiary as its international sales manager. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The director determined that the petitioner had not established that the proffered position would be in a primarily managerial or executive capacity. The AAO affirmed the director's decision and added that the petitioner also had not established a qualifying relationship with the beneficiary's foreign employer and had not established that the beneficiary had been employed in a managerial or executive capacity for the foreign entity.

On motion, counsel for the petitioner submits a declaration from the president of the petitioner. Counsel asserts the information in the declaration establishes that the beneficiary will be employed in a primarily managerial capacity. Counsel claims that the beneficiary supervised five staff for the foreign entity from January 1997 to January 1999. Counsel indicates that the petitioner's president's statement also includes information regarding the beneficiary's duties for the foreign entity. Counsel also contends that the AAO erred in its interpretation of the definition of "affiliate" and submits case law to establish that the decision is incorrect as a matter of law.

The regulation at 8 C.F.R. § 103.5(a)(2) states in pertinent part: "A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence." Based on the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.

On the issue of the beneficiary's managerial capacity for the petitioner, counsel recites the wages paid to the beneficiary's subordinate employees. Counsel also indicates the education level of the beneficiary's subordinate employees. The petitioner's president, in a statement submitted with the appeal, re-states the beneficiary's duties in relation to the subordinate employees and also indicates their education level. Counsel suggests that this information is sufficient to establish that the beneficiary's subordinate employees hold professional positions. However, the information provided on motion is not new evidence. The information regarding the subordinates' salaries was previously provided and any information regarding education levels could have been presented in previous proceedings.

Moreover, the beneficiary's subordinate employees provided descriptions of their duties on appeal and the descriptions did not describe duties that required knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study.

The petitioner has not provided new facts that establish the beneficiary's proffered position comprises primarily managerial duties. Counsel has not provided new facts to support a reopening of the decision on this issue.

Likewise, neither counsel nor the petitioner has provided new evidence relating to the beneficiary's foreign employment. The petitioner's president does not reference the beneficiary's foreign employment in the

statement provided. The record does not support counsel's claim that the beneficiary supervised five staff for the foreign entity. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The motion does not provide new facts supported by affidavits or other documentary evidence that support a reopening of the decision on this issue.

Counsel argues on motion that the AAO's interpretation of the "affiliate" definition was based on an incorrect application of law or policy.

The AAO acknowledges that if one individual owns a majority interest in a petitioner and a foreign entity, and controls those companies, then the companies will be deemed to be affiliates under the definition even if there are multiple owners. To establish the affiliate qualifying relationship, it must be shown that the foreign employer and the petitioning entity share common ownership and control. Control may be "de jure" by reason of ownership of 51 percent of outstanding stocks of the other entity or it may be "de facto" by reason of control of voting shares through partial ownership and possession of proxy votes. *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982).

In this matter the AAO determined that the record contained an inconsistency regarding the ownership of the foreign entity. The AAO observed that the record showed that the petitioner's sole shareholder owned either a 50 percent interest or a 51 percent interest in the foreign entity. On motion, the petitioner resubmits the document showing that the petitioner's sole shareholder owns a 51 percent interest in the foreign entity. However, the petitioner does not explain the document showing that the petitioner's sole shareholder owns only a 50 percent interest. As stated in the AAO decision, it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Counsel has provided pertinent precedent decisions to support the petitioner's motion for reconsideration on the issue of qualifying relationship. However, neither counsel nor the petitioner has offered an explanation of the inconsistency in the record regarding the foreign entity's ownership. Because of the unresolved inconsistency, the AAO's previous decision is affirmed.

Of note, motions for the reopening of immigration proceedings are disfavored for the same reasons as are petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110. With the current motion, the movant has not met that burden. The motion to reopen will be dismissed.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966); Section 291 of the Act, 8 U.S.C. § 1361. The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought.

Matter of Martinez, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). Here, that burden has not been met.

ORDER: The motion is dismissed. The previous decisions to deny the petition are affirmed.